



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

UNIVERSITY OF PENNSYLVANIA LAW REVIEW AND AMERICAN LAW REGISTER

FOUNDED 1852

Published Monthly (Except July, August and September) by The Department of Law
of the University of Pennsylvania, 34th and Chestnut Streets, Philadelphia, Pa.

VOLUME 57

APRIL

NUMBER 7

Editors:

RUSSELL S. WOLFE, President Editor.
NELSON P. FEGLEY, Business Manager. SHIPPEN LEWIS, Book Review Editor

Associate Editors:

J. T. CAREY,	E. S. BALLARD,
A. E. HUTCHINSON,	HAROLD EVANS,
J. B. LICHTENBERGER,	W. P. HARBESON,
W. K. MILLER,	BRISON HOWIE,
D. H. PARKE,	W. L. MACCOY,
L. W. ROBEY,	I. T. PORTER.

R. T. McCracken, (*Fellow in the Department of Law*),
Superintendent Note Department.

SUBSCRIPTION PRICE, \$3.00 PER ANNUM, SINGLE COPIES, 35 CENTS

NOTES.

RIGHT TO RECOVER ON MONOPOLISTIC CONTRACT.

There has been, perhaps, in recent years, no decision rendered in the United States Supreme Court, the effect of which has been so misunderstood and misinterpreted, both by the laity and by those members of the profession who have not had an opportunity of reading the official report of the case, as that rendered by the Court on February 1, 1909, in *Continental Wall Paper Company v. Voight and Sons Company*, reported in 29 Supreme Court Reporter 280, affirming the decision in the Circuit Court of Appeals, reported in 148 Federal Reporter 939.

The Continental Company brought suit in the Circuit Court for the Southern District of Ohio, to recover a balance on an account for goods sold and delivered to the defendant com-

pany. Defendant's answer contained six separate defenses, demurrers to all of which were sustained, except as to the third defense.

As shown by this defense, the facts, admitted by the demurrer, were about as follows: A *et al.*, firms and corporations engaged in the manufacture of wall paper in various States, formed the Continental Company for the purpose of controlling the output of ninety-eight per cent. of the wall paper mills of the United States, and to this end, made contracts with them to buy their entire output at an agreed price. The Continental Company was nominally to make all sales to wholesalers and others, either directly or indirectly, at an agreed price, subject to an agreed scale of discounts, according to an arbitrary classification of buyers. The difference between the price at which the manufacturers sold to the company and the price exacted from the buyers from the company constituted the dividends to be distributed to the shareholders, who were composed exclusively of those controlling the combining manufacturers. The only two manufacturers of wall paper machinery in the United States were induced to become parties by agreeing not to sell except to members of the combination. An agreement was also made with Canadian manufacturers to prevent cutting the price. Each member was required to deposit his shares with the company, to be applied as liquidated damages in case of a breach of the contract. Contracts were then made with jobbers and wholesalers, binding them to buy their entire requirements of the company, at specified prices, and not to sell at less than the prices fixed by the company, on pain that if they did not enter into such contracts they could not buy at all. Defendant, under such a threat and fearing its impossibility to longer continue its business should it refuse to do so, signed one of the agreements last mentioned. Defendant alleged that the prices sought to be recovered were fixed in pursuance of and by the combination agreement, and were excessive, and refused to pay same.

On appeal to the Circuit Court of Appeals, the Court, in an opinion by Judge Lurton, affirmed the judgment. The Court held that it was immaterial to the invalidity of the combination that the agreement was valid at common law as imposing only a reasonable restraint on competition, provided the direct result of its operation was directly to restrain freedom of commerce between the State or with foreign nations, in violation of the anti-trust act of 1890,¹ often referred to as the "Sherman Anti-

¹ Act of July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. Stat. 1901, p. 3200).

Trust Act." Speaking of the effect of the combination, Judge Lurton said: "A more complete monopoly in an article of universal use has probably never been brought about. It may be that the wit of man may yet devise a more complete scheme to accomplish the stifling of competition; but none of the shifts resorted to for suppressing freedom of commerce and securing undue prices, shown by the reported cases, is half so complete in its details." And again, he says: "It must fall within the definition of a 'restraint of trade,' whether we confine ourselves to the common law interpretation of that term, or apply that given to the term as used in the federal act."

The opinion of the United States Supreme Court, to which the case was removed by writ of *certiorari*, was delivered by Mr. Justice Harlan. The gist of the decision was that the contract sought to be enforced was one which was, in fact, and which was intended by the parties to be based upon agreements that were essential parts of an illegal scheme.

The Anti-Trust Act of 1890 declares illegal every contract, combination in the form of trusts or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, and declares it to be a misdemeanor, punishable by fine or imprisonment, to make any such contract or to engage in any such combination or conspiracy. It also makes it a misdemeanor for any one to monopolize or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States, or with foreign nations. The Act further provides that any person injured in his business or property by any other person or corporation violating the foregoing provisions, may recover from such wrongdoer treble damages. As it was admitted by the demurrer that the plaintiff company had violated the Act, the question of whether the combination was illegal did not arise. In a very important case which came before the Circuit Court of Appeals² it was held that the contracts, combinations, and conspiracies in restraint of trade declared to be illegal in interstate and international commerce by the Act of 1890, are the contracts, combinations and conspiracies in restraint of trade that had been declared by the courts to be against public policy and void under the common law before the passage of the Act.

The contention of the plaintiff was, that admitting that it was a "trust" or combination organized in violation of the

² *United States v. Trans-Missouri Freight Association*, 58 Fed. Rep. 58.

"Anti-Trust Act," yet that fact would not prevent the recovering from the defendant corporation the price of the goods purchased by the latter, and reliance was had on a case decided in the United States Supreme Court in 1902.³ There, the defendant in an action brought by plaintiff company for the value of goods sold him, disputed his liability upon the ground that, at the time of the respective purchases, the company was part of an illegal combination. Speaking for the Court, Mr. Justice Harlan, in refusing to hold the defense a good one, said: "The illegality of such combination did not prevent the plaintiff corporation from selling pipe that it obtained from its constituent companies, or either of them." He further said: "The purchases by the defendants had no necessary or direct connection with the alleged illegal combination for the contracts between the defendants and the plaintiff could have been proven without any reference to the arrangement whereby the latter became an illegal combination." A similar rule was laid down in a Wisconsin case,⁴ where it was said that "the mere fact that the plaintiff is a member of a 'trust' will not prevent it in law from selling goods within or affected by the provisions of such trust, and recovering their price or value."

The Court here held, however, that the Connolly case did not apply, saying: "The present suit is based upon agreements to which both the plaintiff and defendant were parties, and pursuant to which the accounts sued on were made out, and which had for their object, and which it is admitted had directly the effect to accomplish the illegal ends for which the Continental Wall Paper Company was organized. If judgment be given for the plaintiff, the result, beyond all question will be to give the aid of the Court in making effective the illegal agreements that constituted the forbidden combinations."

Mr. Justice Holmes, in a strong dissenting opinion, in which Mr. Justice Brewer, Mr. Justice White, and Mr. Justice Peckham concurred, said that the case could not be distinguished from the Connolly case, and that the defendant, having acquired a good legal title from the plaintiff, should be made to pay for it. It must be admitted that there is much force in what he says, but it is respectfully submitted that the distinction drawn by Mr. Justice Harlan seems justified. The defendant's answer in the Connolly case simply alleged that the sales in question were made to the defendant by the plaintiff "in the ordinary course of its business as such trust or com-

³ *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540.

⁴ *National Distilling Co. v. Cream City Importing Co.*, 86 Wis. 352.

bination aforesaid," while in the present case, the defendant alleged that the direct effect of the combination and agreements (including the agreement signed by the defendant) was the stifling of competition and the enhancing the price of wall paper.

Aside from the reasons advanced by the minority of the Court, it may be questioned whether the public policy which prevents recovery in this case and allowed it in the Connolly case is sound. In that case, the purchaser was forced by economic conditions to buy the plaintiff's product at unreasonable prices, and was compelled to pay for it; in the present case the purchaser by entering into an agreement with the vendor, aided, in common with other vendees, in perfecting the illegal scheme, and because of his participation in the forbidden acts, is absolved from paying for goods which he purchased from the trust whose objects he had helped to further. But whatever may be the justice of this position, the law is well settled that the Courts will do nothing to enforce an illegal contract,⁵ and the diversity of opinion among the members of the Court turned mainly on the interpretation of the facts, the minority holding that the agreement between plaintiff and defendant, whereby the latter promised not to buy from any other than the plaintiff, was merely collateral to that between the plaintiff and the manufacturers, having as its object the control of the product of the wall paper mills of the United States, and the majority of the Court holding that both agreements constituted parts of the same illegal transaction, and that to allow recovery in the case at bar would result in carrying out the terms of an illegal contract, which is something that the Court will not do. The case stands clearly on its own facts, and does not overrule the Connolly case (*supra*), which decided that one who purchased goods is not absolved from the duty of paying for them on the ground that his vendor is part of an illegal combination formed in restraint of trade and commerce.

⁵ *Embrey v. Jamison*, 131 U. S. 336.